COMMENT

STATE IMMUNITY FROM TORT LIABILITY AS AFFECTED BY COMPETITIVE BUSINESS ACTIVITY

> The doctrine of sovereign immunity is an anachronistic remnant of the divine right of Kings. The historical supporting maxims of sovereign immunity, "The King can do no wrong" and "He who makes the laws shall not be subjected to them," are no more than legal curiosities when countered by the foundation of our civil law that one suffering injury at the hands of another is entitled to compensation from the wrongdoer. The cabalistic distinctions between governmental and proprietary functions which have been used to ameliorate the harshness of the doctrine of governmental immunity are no longer useful in that they tend to obscure their original function. As the state extends the range of its services and increasingly engages in activities which might equally be undertaken by private individuals and corporations, the unreasonableness of shielding such enterprises with sovereign immunity becomes apparent. Not only would the application of immunity in . . . [such] . . . case[s] subvert the keystone theory underlying civil liability thereby derogating the right to compensation of injured persons, but it would impose an additional indirect burden on private enterprise, engaging in competition with the public corporation in competitive media. . . .[1]

The purpose of this comment is to propose a limitation, which the courts might be persuaded to adopt, on a state's immunity when it engages in active competition with private enterprise. The justification for re-examining the doctrine of sovereign immunity before extending it into new areas can be summarized in three points:

First, a comparison of economic trends today with those prevailing in the period when sovereign immunity was developed reveals the inappropriateness of the present law. Sovereign immunity was adopted by the courts during the hey-day of the *laissez faire* philosophy. The theory was that if government were compelled to pay for its torts, it could do so only by taking from the rest of society through taxation, thereby increasing each individual's burden of maintaining government and decreasing his capacity to provide for himself.[2] However, times have changed and the interest in the eco-

[1] Hoffmeyer v. Ohio Turnpike Comm., 83 Ohio L. Abs. 391, 166 N.E.2d 543 (1960).

[2] One of the earliest and most vigorous attacks on sovereign immunity was waged by Professor Borchard in a series of articles. In these articles is a tracing of sovereign immunity from its inception to the time of publication, Borchard, "Government Liability in Tort," 34 Yale L.J. 1, 129, 229 (1924); 36 *id.* 1, 757, 1039 (1927); 28 Colum. L. Rev. 577, 734 (1928).

nomic freedom of the individual has long ago been subordinated to the desire for social and economic security. The overwhelming trend is toward spreading of losses throughout society and lessening the risk to each individual.[3] Regardless of one's predilection on the merits of this movement, the fact that the doctrine of sovereign immunity bucks this trend should justify a re-examination of the immunity doctrine.

Secondly, since the traditional functions of state governments have long been immune it is difficult to persuade the courts to overrule this stand. If relief is to come in this area, it must be from the legislatures. But even here, because of the fears of many legislators of the havoc which complete waiver of immunity might bring upon governmental operations, and the absence of any organized pressure groups urging such a waiver, legislative action is very likely to be sporadic and incomplete for many years.[4] When one considers the courts' role in the inception and perpetuation of sovereign immunity, is it unreasonable to urge that they deny immunity in new situations where they need not feel bound by precedent? The original reasons for adopting this doctrine can no longer support its extension into new areas.

The third factor justifying judicial re-examination of the immunity doctrine is the rapid expansion of state agencies into fields of endeavor in which they compete with private enterprise for the public's patronage. Irrigation projects, printing plants, toll bridges and roads, steam and electric railroads, airports, power plants, coal mines, cement plants, warehouses, grain elevators, and insurance and banking companies are among the many state enterprises.[5] A glance

[3] In order to carry out the many functions which modern government must undertake to secure the needs of society, government must expand its activities. As its operations become more extensive, there is a corresponding increase in the likelihood of injuries to individuals. Unless the resulting loss is assumed by government and spread throughout the society which is benefiting from the activity, the goal of maximum satisfaction for everyone in society cannot be obtained.

[4] Gibbons, "Liability Insurance and the Tort Immunity of State and Local Government," 1959 Duke L.J. 588; Davis, "Tort Liability of Governmental Units," 40 Minn. L. Rev. 751,760 (1956); Leflar & Kantrowitz, "Tort Liability of the States," 29 N.Y.U.L. Rev. 1363 (1954) (This article is a state by state survey of the extent of liability, if any, and procedural steps necessary to recover for injury at the hands of the state). A less extensive survey can be found in Note, "Administration of Claims Against the Sovereign—A Survey of State Techniques," 68 Harv. L. Rev. 506 (1955). Two articles tracing immunity through its development in Arkansas are Waterman, "100 Years of a State's Immunity from Suit," 14 Texas L. Rev. 135 (1936) reprinted in 2 Ark. L. Rev. 354 (1948); and Eckert, "Another Decade of State Immunity to Suit," 2 Ark. L. Rev. 375 (1948).

[5] Johnson, Government in the United States 710 (1956); MacDonald, American State Government and Administration 602 (1955); Shultz & Harriss, American Public Finance 607-609 (1949). For an analysis of the overall effect of "State Trading" on

at this casual listing reveals many areas of head-on competition with private enterprise.

While we are concerned primarily with freedom from tort liability, the sovereign's status gives the state business an advantage in at least two other ways.[6] One advantage is the saving to the state enterprise by virtue of its immunity from many taxes. The immunity from many governmental regulations also gives the state-controlled business an operating advantage.[7] These aspects of immunity involve the problem of inter-governmental relations and are beyond the scope of this comment.[8] It is sufficient to recognize their existence and the economic benefits accruing to the state business from their application.

Since we are primarily interested with the freedom from tort liability enjoyed by state agencies, the question to be resolved is whether the courts, in the absence of legislative directives, should hold that immunity does not extend to state agencies in competition with private business. In order for the courts to impose tort liability in this area and also retain immunity for the traditional functions of government, some line of demarcation must be adopted to distinguish non-immune functions from those within the immunity doctrine. While anything short of complete waiver of immunity will result in the barring of legitimate claims against the state, for the reasons enumerated above, success in the courts is more likely if an approach is adopted which will attack this immunity in a piecemeal fashion.

Existing Distinctions

Discretionary Function

The "discretionary function" test developed by the federal courts in applying the Federal Tort Claims Act[9] does not appear to be readily adaptable to the solution of our problem. This test originated in the clause preserving the immunity of the United States for acts

modern society, see 24 Law & Contemp. Prob. 241-366 (1959) which is an entire symposium devoted to this development in the United States.

[6] For a discussion of the effect of state trading on these immunities, see Setser, "The Immunities of the State and Government Economic Activities," 24 Law & Contemp. Prob. 291 (1959).

[7] This immunity applies most favorably to a federal business by exempting it from the application of many state regulations, Setser, *supra* note 6 at 300. On the state level, while a state business may be exempted from some municipal regulations, the red tape involved in any government agency probably outweighs any advantage over private companies subject to the municipal regulation.

[8] For discussions of these immunities, see Setser, *supra* note 6; Note, "Immunity from Statutes of Limitations and Other Doctrines Favoring the United States as Plaintiff," 55 Colum. L. Rev. 1177 (1955); Ratchford, "Intergovernmental Tax Immunities in the United States," 6 Nat'l Tax J. 305 (1953).

[9] 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

committed within the "discretionary function or duty" of any federal agency or employee.[10] The Tort Claims Act itself purports to render the United States liable ". . . in the same manner and to the same extent as a private individual under like circumstances."[11] It is apparent from reading the act that Congress did not intend to waive immunity for all governmental functions.[12] Since the Supreme Court has refused to adopt the "proprietary-governmental" distinction traditionally used to determine liability on the municipal level,[13] some other distinction had to be developed.

In *Dalehite v. United States*,[14] the Supreme Court interpreted the "discretionary function" clause as a limitation on the general liability clause. The difficulty in applying this distinction lies in discovering what a discretionary act is, when it starts, and when it ends. As to the point at which discretion ends, the Court stated that, "it is unnecessary to define . . . precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities."[15] From this, the lower federal courts have distinguished between acts of discretion, made at the "planning" or "policy making" level, and negligent acts or omissions at the "operational" level, holding the government liable only in the latter situation.[16]

However, regardless of the interpretation given to this distinction, it is clear that state courts will not accept it without statutory authority since its application will remove immunity from many of the functions which have traditionally been immune. An excellent example of this is the negligent operation of a motor vehicle by a government employee. Under the "discretionary function" test, such negligence will usually be actionable, regardless of the purpose of the operation, since it is not a discretionary function.[17] While this is

[10] 28 U.S.C. § 2680 (a) (1952). For a perceptive study of the "discretionary function" test, see Peck, "The Federal Tort Claims Act—A Proposed Construction of the Discretionary Function Exception," 31 Wash. L. Rev. 207 (1956).

[11] 28 U.S.C. § 2674 (1952). For a study of the federal courts interpretation of the scope of this general liability clause, see Note, "Federal Government Liability 'As a Private Person' Under the Tort Claims Act," 33 Ind. L.J. 339 (1958).

[12] Dalehite v. United States, 346 U.S. 15 (1953).

[13] Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[14] *Supra* note 12.

[15] *Id.* at 35.

[16] Fair v. United States, 234 F.2d 288 (5th Cir. 1956); Dahlstrom v. United States, 228 F.2d 819 (8th Cir. 1956); United States v. Union Trust Co., 221 F.2d 62 (3rd Cir. 1955); 2 Harper & James, Torts § 29.14 at 1657-1660 (1956); Prosser, Torts § 109 at 773 (2d ed. 1955).

[17] *Ibid.*

undoubtedly a desired result, it is impractical, in light of the courts' reluctance to withdraw established immunity, to urge the adoption of this test to deny immunity in the area under consideration.

Proprietary—Governmental

The "proprietary—governmental" distinction does not appear to be readily adaptable to states either,[18] at least in its present state of development. The scheme of removing immunity from a municipality when it is engaged in a proprietary function has been attacked by legal analysts as inherently unsound since it was formally adopted in 1842 in *Bailey* v. *City of New York*.[19] Yet this doctrine has been adopted and applied, at one time or another, with varying degrees of success and persistency by every state in the union.[20] South Carolina and Florida are the only states which have repudiated this distinction by judicial action, stating that the quagmire of conflicting decisions rendered it impossible to apply the law coherently to any given situation. In repudiating, the South Carolina Supreme Court granted complete immunity to the municipality unless waived by the legislature.[21] Thus, the situation was cured by turning a possible chance of recovery into no chance whatever. On the other hand, Florida has imposed liability on the municipality without regard to the nature of the function causing the injury.[22]

> A municipality is clothed with a two-fold function; one governmental, and the other proprietary. In the performance of a gov-

[18] The adoption of this distinction was urged upon the state courts as early as 1916, without success, Maguire, "State Liability for Tort," 30 Harv. L. Rev. 20 (1916).

[19] 3 Hill 531 (N.Y. 1842). The earliest United States case to impose liability on this basis apparently was Hooe v. Alexandria, 12 Fed. Cas. 461 (No. 6666) (C.C.D.C. 1802). For a historical development of this doctrine, see Barnett, "The Foundations of the Distinction Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations," 16 Ore. L. Rev. 250 (1937).

Some of the more vigorous attacks can be found in, Borchard, *supra* note 2; Fuller & Casner, "Municipal Tort Liability in Action," 54 Harv. L. Rev. 437 (1941); Harno, "Tort Immunity of Municipal Corporations," 4 Ill. L.Q. 28 (1921); Tooke, "The Extension of Municipal Liability in Tort," 19 Va. L. Rev. 97 (1932); Seasongood, "Municipal Corporations: Objections to the Governmental or Proprietary Test," 22 Va. L. Rev. 910 (1936). For a survey of the legal writings on this topic, see Repko, "American Legal Commentary on the Doctrines of Municipal Tort Liability," 9 Law & Contemp. Prob. 214 (1942) (this article is part of a symposium on Governmental Tort Liability, 9 Law & Contemp. Prob.). For a survey of the applicable case law, see Annot., 120 A.L.R. 1376 (1939).

[20] Repko, *supra* note 19; 2 Harper & James, Torts § 29.6 (1956).

[21] Irvine v. Greenwood, 89 S.C. 511, 72 S.E. 228 (1911). Ohio appeared to head in the opposite direction by creating a presumption that the function was proprietary, Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919), but this bold step was retracted in Aldrich v. Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922).

[22] Hargrove v. Town of Cocoa Beach, 60 A.L.R.2d 1193, 96 So. 2d 130 (Fla.

> ernmental function, the municipality acts as an agency of the state to enable it to better govern that portion of its people residing within its corporate limits . . . There is granted to a municipal corporation, in its corporate and proprietary character, privileges and powers to be exercised for its private advantage. In the performance of these duties the general public may derive a common benefit, but they are granted and assumed primarily for the benefit of the corporation.[23]

The difficulties in applying this abstract statement of the law to such functions as the operation of an airport, collection of garbage, maintenance and operation of streets and sewers, and the operation of wharves and docks are apparent; it is no surprise that courts have found themselves in hopeless conflict on the classification of these and similar functions.[24] When the above difficulties are compounded by the two situations in which liability is imposed regardless of the function being performed,[25] the problems encountered in attempting to apply this distinction at the state level become painfully clear.

There are two major blocks to any attempt to invoke this test on the state level. The first is the historical differences delineated in the above quote. Regardless of the validity of these differences today, the courts will at least recognize them, and they will provide a handy peg for any court not wholly receptive to any scheme to limit state immunity. The second, and major, block is that this distinction, like the "discretionary function" test, would render many state functions subject to liability which traditionally have been immune.[26] Only in rare situations will the courts accept any refinement in sovereign immunity which will erase any great amount of established immunity.

The New York Test: "Purely Governmental"

The New York Court of Claims Act provides that, "the state hereby waives its immunity from liability and action and hereby

1957). See Annot., 60 A.L.R.2d 1198 (1958) for a summary of the case law on municipal tort liability. The *Hargrove* case has been discussed in 7 Duke L.J. 142 (1958); 71 Harv. L. Rev. 744 (1958); 4 How. L.J. 131 (1958); 56 Mich. L. Rev. 465 (1958); 29 Miss. L.J. 240 (1958); 11 U.Fla. L. Rev. 121 (1958); and 11 Vand. L. Rev. 253 (1957).

23 Hoogard v. City of Richmond, 172 Va. 145,147, 200 S.E. 610,611 (1939).

24 2 Harper & James, Torts § 29.6 (1956); Prosser, Torts § 109 at 775 (2d ed. 1955). For a more detailed analysis of the conflicts in this area, see 18 McQuillin, Municipal Corporations §§ 53.23-53.59 (3d ed. 1950).

25 These exceptions are: (1) Where the injury is the direct result of a trespass on private property, the only escape from liability for the municipality is to prove state authorization for the trespass. (2) There is no escape when the injury results from the city creating, maintaining, or tolerating a nuisance. For a discussion of these exceptions and their importance in municipal tort liability, see Repko, *supra* note 19.

26 Such an effect would be certain since the original purpose for creating the distinction was to limit immunity on the municipal level. Barnett, *supra* note 19.

assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations. . . ."[27]

The major problem presented by the wording of the liability clause concerns those functions which are performed only by government.[28] Since such "purely governmental" functions have been traditionally immune, most courts will not deny immunity in these situations without express statutory authorization. Therefore, while it is important to recognize this problem created by such a waiver, our primary concern with this statute is to determine why New York courts have not adopted the previously discussed distinctions.

In *Dulinak* v. *State*,[29] decided in 1940, the New York Court of Claims expressly rejected the "proprietary—governmental" test as it had been applied to municipalities. The court allowed recovery for an injury resulting from the negligent maintenance of a stoplight on a state highway. The municipality cases which would have barred recovery on the theory that the maintenance of a stoplight is a proprietary function, were distinguished by stating that, "however, the foregoing authorities were not suits against the State of New York." As is apparent from this case, the result of refusing to adopt the "proprietary—governmental" distinction is to allow recovery where it would be barred under a strict application of the test.

While the New York courts have not expressly rejected the "discretionary function" test, neither have they adopted it. This is not surprising since the New York act does not contain any limitation similar to the "discretionary function" clause in the United States waiver statute. However, in applying New York's test of "purely governmental" to such functions as legislative acts, judicial acts, inspection services, and police activities, the results are similar to those reached under the "discretionary function" test.[30] It is significant in this respect that New York decisions seem to have influenced the United States Supreme Court in a number of cases decided under the Federal Tort Claims Act.[31]

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[27] N.Y. Court of Claims Act § 8.

[28] An excellent analysis of the New York courts' approach to this problem can be found in Herzog, "Liability of the State of New York for 'Purely Governmental' Functions," 10 Syracuse L. Rev. 30 (1958).

[29] 177 Misc. 368, 30 N.Y.S.2d 796 (Ct.Cl. 1940), *aff'd* 262 App. Div. 1064, 30 N.Y.S.2d 838 (1941).

[30] Compare the analysis in Herzog, *supra* note 28, with those in Peck, *supra* note 10, and Note, *supra* note 11. *See* 72 Harv. L. Rev. 1386 (1959) for a discussion of the New York case imposing liability for failing to provide adequate police protection to the informer on Willie Sutton.

[31] Barrett v. State, 220 N.Y. 423, 116 N.E. 99 (1917) and Goldstein v. State, 281 N.Y. 396, 24 N.E.2d 97 (1939) were cited in Dalehite v. United States, *supra* note 12;

Perhaps the reason New York has adopted neither of the existing tests can be discovered in their basic difference: In the "governmental—proprietary" test, the same activity may receive different treatment, liability depending on whether the purpose motivating the tortious act was governmental or proprietary in nature.[32] On the other hand, in applying the "discretionary function" test, similar activities will always receive the same treatment since the *act* itself controls, rather than the *purpose* behind the act as in the proprietary distinction. The New York courts seem unwilling to be committed to either of these approaches.[33]

Thus, the only jurisdictions which have adopted the existing distinctions and applied them above the municipal level have done so under statutory authority. If sovereign immunity is to be limited and not extended to new areas of state functions, some test must be developed which will be acceptable to the courts.

"Competition" Distinction

An examination of recent cases in this area suggests that the courts are developing a test which is sometimes called "proprietary—governmental" by the courts, but which is actually much more limited and specific. A positive statement of this test would be something similar to this: *Sovereign immunity does not extend to state agencies created for the purpose of performing functions which bring the state into competition with private enterprise in areas which have been traditionally considered as fields of private endeavor.*[34]

The theory that a state may lose its immunity by entering into private competitive fields is not new. As early as 1824 Chief Justice Marshall said in *Bank of United States* v. *Planters' Bank of Georgia,*[35]

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so

Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945) and Foley v. State, 294 N.Y. 275, 62 N.E.2d 69 (1945) were cited in Indian Towing Co. v. United States, *supra* note 13. For a discussion of the importance of New York cases in the interpretation of the Federal Tort Claims Act, see Peck, *supra* note 10.

[32] Thus, if a person is injured by the negligent operation of a city vehicle while the operator of the vehicle is engaged in laying out or planning a sewer, no liability will attach; but if the same accident involving the same parties and vehicles had occurred during a repairing operation to an existing sewer, liability would result, Prosser, Torts § 109 at 777-778 (2d ed. 1955).

[33] Herzog, *supra* note 28.

[34] Once the courts decide that an agency fits within this rule, immunity should not extend to any of its functions, regardless of how "governmental" some of its activities may appear. By following this uncompromising approach, perhaps the courts can force the legislature to spell out in detail which of its agencies are to enjoy immunity and to what extent.

[35] 22 U.S. (9 Wheat) 904, 906 (1824).

> far as concerns the transactions of the company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

The language used by that great jurist certainly fits the situation with which we are faced. However, when the words are placed in the context, we discover that Marshall was referring to contract liability, not tort liability. Such expressions in the early cases are significant only in that they planted the seed for extension of this doctrine into the tort area.[36]

The application of any functional distinction on the state level has met with varying and conflicting interpretation, both within and among states. Two Missouri cases will show how courts place very different meanings on such terms as "proprietary" when confronted with different situations. In a tort action against a county for raising the level of a road grade, the Missouri Supreme Court held road grading to be a governmental function, although admitting that the same function performed by a municipality would have been proprietary.[37] Six years later, the same court upheld an action for an alleged breach of a lease against the Board of State Charity Managers, distinguishing the case from a prior dismissal of a tort against the same department by proclaiming that ". . . the present action is not in tort, but for the breach of an alleged lease *contract,* a *proprietary* matter."[38] (Emphasis added.) In none of the above cases had the legislature waived immunity to suit.

At the present time, probably no more than five states have expressly refused to recognize possible tort liability of the state based on the function being performed. On the other hand, many states have paid lip service to some sort of distinction, but one is hard pressed to find many concrete examples of liability imposed solely on the basis of the function performed.[39]

The approach of the Louisiana courts to this problem is worthy of note. In 1932, a Louisiana court soundly blasted the extension of

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[36] Similar cases are Curran v. Arkansas, 56 U.S. (15 How.) 304 (1853); Darrington v. Bank of Alabama, 54 U.S. (13 How.) 12 (1851); Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837); Sargent County v. State, 47 N.D. 561, 182 N.W. 270 (1921).

[37] Zoll v. St. Louis County, 343 Mo. 1031, 124 S.W.2d 1168 (1938).

[38] White v. Jones, 352 Mo. 354, 177 S.W.2d 603 (1944).

[39] The most famous case rejecting any such distinction on the state level is Riddock v. State, 68 Wash. 329, 123 Pac. 450 (1912). Other cases purporting to follow the principle that a state acts only in a governmental capacity are collected in Annot., 40 A.L.R.2d 927,932 (1955).

immunity to state corporations and agencies, but concluded that relief could only come from the legislature.[40] Then in 1954, the court pounced on the legislative authorization of a State Soil Conservation District to "sue and be sued" as an express waiver of all immunity, thus allowing recovery for the negligence of a truck driver-employee of the district.[41]

The New Jersey Supreme Court took a similar approach in a recent case[42] involving an injury to a visitor on the premises of a tenement house condemned under eminent domain by the Highway Authority, the tenants having not yet been evicted. The court concluded that maintaining a tenement house was a proprietary function and allowed suit under a statute impowering the Highway Authority to "sue and be sued." In support of this interpretation of the statute, the court quoted Judge Cardozo to the effect that:

> The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced.[43]

Under a limited waiver-of-immunity statute,[44] California has adopted a variation of the suggested distinction. In the early cases following the enactment of the 1893 statute, the courts were very slow to find a non-governmental activity. However, the tide turned in 1947 when the court decided *People* v. *Superior Court*.[45] In this celebrated decision the court also brushed aside an earlier unsound test that required that the state agency be run with the intent to earn a profit before it could be held liable in tort.[46] The California cases

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40 Orgeron v. Louisiana Power & Light Co., 19 La. App. 628, 140 So. 282 (1932).

41 Long v. N.E. Soil Conserv. Dist. of La., 72 So. 2d 543 (La. Ct. App. 1954). *Accord,* Western R.R. v. Carlton, 28 Ga. 180 (1859).

42 Taylor v. New Jersey Highway Auth., 22 N.J. 454, 126 A.2d 313 (1956).

43 Anderson v. John L. Hays Constr. Co., 243 N.Y. 140,147, 153 N.E. 28,29 (1926).

44 Cal. Gov. Code § 16041 (1893): "Any person who has a claim against the State (1) on express contract, (2) for *negligence,* or (3) for the taking or damaging of private property for public use within the meaning of Section 14 of Article I of the Constitution, shall present the claim to the board in accordance with Section 16021. If the claim is rejected or disallowed by the board, the claimant may bring an action against the State on the claim and prosecute it to final judgment, subject to the conditions prescribed by this chapter." (Emphasis added.) This act has been interpreted as waiving only the state's immunity from *suit,* not from *liability,* 27 So. Cal. L. Rev. 490 (1954).

45 29 Cal. 2d 754, 178 P.2d 1 (1947). Although the court cited Green v. State, 73 Cal. 29, 14 Pac. 610 (1887), as authority for the origination of the distinction based on activity in California, it was not until *People v. Superior Court* was decided that this distinction had a non-governmental side.

46 This test had been propounded 20 years earlier in Rauschan v. Gilbert, 80 Cal. App. 754, 253 Pac. 173 (1927), in which the court refused recovery against a state in-

are not yet clear as to the test being applied by the courts; although called "proprietary—governmental," it appears to be similar to the test suggested in this article. A survey of the California cases discloses the imposition of tort liability for such functions as operating a railroad,[47] providing entertainment facilities at a state fair,[48] slum clearances,[49] and presenting National Guard firepower demonstrations to entertain the public.[50] On the other hand, operating a toll bridge,[51] leasing state-owned wharves to private concerns,[52] operating a harbor,[53] and relocating a river[54] have been held activities to which governmental immunity extends.

The Ohio situation is illustrated by two recent Ohio Supreme Court decisions. The court appeared to be headed toward a reexamination of immunity when in *Avellone* v. *St. Johns Hospital*,[55] it overruled the line of cases granting immunity to charitable hospitals. In that case, the reasons for immunity were explored and held not to substantiate further application of the doctrine in the situation under scrutiny. Despite this glowing attack on immunity, three years later in *Wolf* v. *Ohio State University Hospital*,[56] the court upheld the traditional concept of immunity when the state was involved. In this case, an employee of the hospital was clearly negligent in giving

surance fund since the operation was not allowed to make a profit, but only to be self-sustaining.

47 Green v. State, *supra* note 45.

48 Guidi v. State, 41 Cal. 2d 623, 262 P.2d 3 (1953) which overruled Melvin v. State, 121 Cal. 16, 53 Pac. 416 (1898). The *Guidi* case was followed in Brown v. 15th Agricultural Fair Ass'n, 159 Cal. App. 2d 93, 323 P.2d 131 (1958). *Contra,* Zoeller v. State Board of Agriculture, 163 Ky. 446, 173 S.W. 1143 (1915) (operation of fair held to be a governmental function). A discussion of the *Guidi* case and the California law under their consent statute can be found in 27 So. Cal. L. Rev. 490 (1952).

49 Muses v. Housing Auth., 83 Cal. App. 2d 489, 189 P.2d 305 (1948). The action was against a county as an arm of the state. For a discussion on the tort liability of counties when engaged in proprietary functions, see Annot., 16 A.L.R.2d 1079 (1951).

50 Pianka v. State, 46 Cal. 2d 208, 293 P.2d 458 (1956).

51 Bettencourt v. State, 123 Cal. App. 2d 60, 266 P.2d 201 (1954).

52 Schwerdtfeger v. State, 148 Cal. App. 2d 335, 306 P.2d 960 (1957).

53 Denning v. State, 123 Cal. 316, 55 Pac. 1000 (1899).

54 Green v. State, *supra* note 45.

55 165 Ohio St. 467, 135 N.E.2d 410 (1956). The effect of this progressive decision has been severely curtailed in a recent ill-considered opinion, Gibbon v. YWCA, 170 Ohio St. 280, 164 N.E.2d 563 (1960). An excellent discussion of this case can be found in 21 Ohio St. L.J. 247 (1960). The latest episode of charitable immunity in Ohio evidences a trend analogous to that in state immunity discussed in this comment. In Blankenship v. Alter, 171 Ohio St. 65, 167 N.E.2d 922 (1960), the supreme court held that a church waived its immunity by sponsoring bingo games for profit, and was therefore subject to liability for the injury to a participant in the bingo contest caused by a collapsing chair.

56 170 Ohio St. 49, 162 N.E.2d 475 (1959).

plaintiff tetanus antitoxin over her protest when a test had indicated her allergy thereto. The only question decided by the court was whether the trustees of the Ohio State University were suable in tort. The court concluded that since the defendant was an arm of the state government, it was immune from tort liability unless expressly waived by statute. There being no such waiver, the doctrine of sovereign immunity precluded suit against defendant ". . . at least while engaged in governmental functions or activities."[57] Thus, the court implied that the state may be liable in tort while engaged in non-governmental functions. Judge Taft, concurring, expressly reserved as not before the court the question whether the trustees would be liable for negligence in the performance of a proprietary function.[58] It is worthy of note that while state-run hospitals are in competition with private hospitals, most courts which have decided the question have held that the operation of such hospitals involves a governmental function.[59]

Hoffmeyer v. *Ohio Turnpike Commission*,[60] decided by the Common Pleas Court of Cuyahoga County in April of 1960, if upheld, will open new horizons for recovery against state agencies in Ohio. The case involved a tort action against the Commission for the alleged unprovoked assault by its employees upon the plaintiff, a customer at a Turnpike Service Plaza. The court looked at the overall scheme of the authorizing legislation[61] to determine whether the prevailing function of the undertaking was governmental or private in character. The conclusion reached was that the Turnpike was more in the nature of a private endeavor than a governmental activity. Thus the Commission's motion for summary judgment based on immunity was denied.

The case is also important in that it expressly states an important consideration which underlies many of the decisions in this area. In the court's words,

> The test used to determine entity and therefore liability is whether or not state funds would be subjected to the payment of the judgment in the event the Commission is found liable.[62]

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[57] *Id.* at 53, 162 N.E.2d at 478. It is important to note that this line is a quote from "Tort Liability of Public Schools and Institutions of Higher Learning," Annot., 160 A.L.R. 7,52 (1946).

[58] *Id.* at 54, 162 N.E.2d at 479, "Whether it [the state] is suable or liable in tort for negligence in the performance of a proprietary function is a question not before us for determination in this case."

[59] Annot., 25 A.L.R.2d 203 at 210 (1952).

[60] *Supra* note 1. *Accord,* Hope Natural Gas Co. v. West Virginia Turnpike Comm'r, 105 S.E.2d 630 (W. Va. 1958).

[61] Ohio Rev. Code §§ 5537.01—5537.99 (1954).

[62] *Supra* note 1 at 393, 166 N.E.2d at 545. This test is similar to the argument for charitable immunity, see 21 Ohio St. L.J. 247 (1960).

Thus, "financial independence" becomes the test for non-immunity, provided the function being performed is of a non-governmental nature.

Another recent opinion seizing upon the isolation of state funds was written in *State Ins. Fund* v. *Bone*,[63] a 1959 Oklahoma case imposing laibility on the Fund in a tort action arising out of an automobile accident involving the plaintiff and an employee of the Fund. The court stated that ". . . under no circumstances can the general funds of the State be reached in order to satisfy an obligation of the fund."[64] The court in the *Bone* case employed the logical argument that since state law required private insurance companies to provide for such contingencies as tort liability, in the absence of express legislative authority, the court could not conclude that the state agency which was actively competing for the public's patronage could escape providing the same remedies.

The concept advanced in these two cases, while an adequate answer to the protection-of-public-funds argument explored in the next section, is undesirable as a limitation on the suggested test previously stated. Even though this isolation test would impose liability in some situations in which the state might otherwise be immune, it would also rule out recovery in many deserving situations in which public funds would be invaded. A comparison of the two Ohio cases discussed earlier will point out the anomalies which result from such a rule. In the *Wolf* case, public funds would have to be invaded since the University Hospital operates out of the general fund of the state. However, the income from the operation of the hospital is poured into the general fund so that an accounting would be necessary to determine whether a profit or loss results from the operation of the hospital. But regardless whether a gain or loss results, the important consideration is where the *ultimate* loss in case of recovery will fall. In this situation, while the loss would be borne directly by the general fund, eventually it would come to rest on the taxpayer. In the Turnpike case, the loss could be passed on to the users of the road. In either situation, the ultimate loss comes to rest on a large segment of society rather than on the individual suffering the injury.[65]

[63] 344 P.2d 562 (Okla. 1959). For a discussion of the Oklahoma law on state immunity prior to this case see 12 Okla. L. Rev. 184 (1959).

[64] *Id.* at 568.

[65] While this argument ignores the "direct benefit" theory (i.e., the users of the highway are receiving a direct benefit for their payment which does not occur when dealing with the general fund), it is submitted that this is a poor distinction on which to allow recovery in one situation and deny it in another. This argument is really just a makeweight used to support the protection-of-public-funds theory, and of even less validity.

Thus, even though the eventual loss falls on society in both situations, the fact that satisfaction must come from the general fund in the *Wolf* type situation denies recovery under this isolation theory. The results from the "financial independence" test are less then perfect.

THEORIES FOR RETAINING IMMUNITY EXAMINED

> The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, "the King can do no wrong," should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.[66]

The reason advanced by more recent cases for retaining immunity is the protection of public funds and public property.[67] This corresponds to the "trust fund" theory upon which charitable immunity is primarily based. The argument seems to follow the reasoning that it is better for the individual to suffer than for the public to be inconvenienced. The advent of the insurance concept has greatly diminished the value of this approach. This factor, insurance, is the main consideration of many of the courts which have refused immunity in certain situations. Much has been written recently concerning the effect of liability insurance on municipal immunity.[68] These articles apply to the states with equal vigor. The majority of jurisdictions have held that the purchase of insurance is not a waiver of sovereign immunity and that the insurance is enforceable only when purchased to cover activities to which immunity does not extend.[69] Thus, without changing this view, liability insurance could be purchased to cover state business functions and the last remaining reason for immunity, the protection of public funds, would lose any validity it has. The thesis is not that the courts should find an implied waiver of immunity upon the purchase of insurance, but rather that immunity should not extend to these activities, since insurance is available to cover this contingency. Of course the application of this

[66] Barker v. City of Santa Fe, 47 N.M. 85, 136 P.2d 480,482 (1943).

[67] *Supra* notes 55, 62, 63, 64, and 65.

[68] Gibbons, *supra* note 4 and materials cited therein; Annot., 68 A.L.R.2d 1437 (1959).

[69] Gibbons, *supra* note 4 at 594.

doctrine will raise the cost of government by the amount of the premiums, but this cost would be spread over all of society in line with the modern trend toward spreading the risk.

Inextricably interwoven with the insurance concept is the cost of the government function to society as a whole. In a modern society it is desirable to channel governmental effort into the most productive endeavors. To determine whether this is being done, it is necessary to compute the value to society of any governmental function. To find its value, it is necessary to find the function's total cost; since the infliction of tortious injury upon citizens is a cost to society, this should be added to the cost of any state-run business. The most accurate method of finding this cost is to allow recovery for these injuries. Whether the cost is determined by the purchase of liability insurance or by self-insurance, it must be found to determine whether it is worthwhile to continue this function.

A side effect of such a doctrine is that it might indirectly lead to the eventual waiver of immunity by state legislatures in response to the lobbying of insurance companies. The companies are starting to realize the potentialities of this untapped source of insurable risks. Their efforts are already appearing in some states which have authorized the purchase of insurance to cover possible claims which are usually within the immunity doctrine.[70] Other states have *required* insurance in some situations.[71] Since courts, with their typical conservative approach, have often held these purchases under permissive statutes to be wasteful when intended to cover immune activities, many governmental units have insured their employees.[72] While this device provides a remedy, it is not as effective as allowing the state to be sued. If the jury does not realize the employee is insured, it may be reluctant to return a verdict against him.[73]

The concept of self-insurance on the state level raises an important question. Should the state be self-insured, thus allowing recovery out of the general fund, or should the state authorize or require the purchase of insurance by the agencies created to engage in business functions? While self-insurance is more feasible on the state level than on the municipal level, this concept is vulnerable to the protection-of-public-funds theory previously discussed.[74] Even though this question should not be considered by the courts, since the

[70] *Id.* at 596 *et. seq.*

[71] *Ibid.*

[72] *Ibid.*

[73] Also, to make liability contingent upon the existance of insurance allows each agency to decide if, and to what extent it will be answerable for its torts. This thesis is explored further in the succeeding pages.

[74] *Supra* pp. 659-661.

cost to the state will frequently be less when it is self-insured, many courts do consider the source from which damages would be paid. Thus, it is important at least to mention the availability of liability insurance to cover these risks when arguing that a court not extend immunity into the area under consideration.

PROBLEMS IN TRADITIONALLY IMMUNE AREAS

The application of the suggested test is likely to extend into areas which some courts have held to be always immune. This is true despite the inclusion of the "traditionally private endeavor" concept into the test. One such area is the immunity of school districts.[75] The approach taken by the Supreme Court of Illinois in *Molitor* v. *Kaneland Community Unit District N. 303*[76] merits full consideration. Plaintiff, while riding on defendant's school bus, was injured because of the alleged negligence of the driver, and sought to hold the school district liable. The Illinois Supreme Court allowed recovery despite an abundance of authority to the contrary. The opinion is worthy of a detailed analysis. Under the facts, the court was presented with three alternative courses.

The first was a re-affirmation of immunity, based on the argument that since the state is immune, so are school districts which are arms or agencies of the state.

The second was to follow the course hinted at in an earlier Illinois case involving the liability of a charitable educational institution.[77] There the court concluded that the school would be liable to the extent it was insured. This approach would have been an easy escape for the court since the Illinois School Code authorized the purchase of liability insurance by any school district transporting children to and from school. Also, the defendant school district in the suit was covered by liability insurance (although not to the extent of the amount prayed for by the plaintiff). However, the court chose not to accept this easy way out since ". . . the difficulty with this legislative effort to curtail the judicial doctrine is that it allows each school district to determine for itself whether, and to what extent, it will be financially responsible for the wrongs inflicted by it."[78]

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[75] Other similar areas are road and bridge construction and maintainance, public beaches and parks, and police protection of citizens. (For a discussion of Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534 (1958) involving the liability of New York City for failing to provide ample protection to the informer on Willie Sutton, see 72 Harv. L. Rev. 1386 (1959)).

[76] 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

[77] Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950).

[78] *Supra* note 76 at 13, 163 N.E.2d at 92. *Cf.*, Moreno v. Aldrich, 113 So. 2d 406 (Fla. Ct. App. 1959) where recovery was allowed against a state fish and game association only to the extent it was insured.

The third possibility, and that chosen by the court, was the complete abolition of immunity to school districts. In abolishing this immunity the court felt that it should not base tort liability on the "financial independence" test previously discussed. In rejecting the "isolation-of-funds" theory, the court cited the permissive insurance statutes and reasoned that if public funds could be used to purchase the liability insurance, it also can be spent to pay liability itself in the absence of insurance. The court did recognize the value of insurance in providing for this contingency and predicted that this decision would encourage its wider use under the permissive statute.

Another meritorious approach by the court was its refusal to wait for legislative change of the school immunity doctrine. The court reasoned that since it had invoked the rule, it was the court's duty to rid the law of a doctrine that had outlived its usefulness.[79]

Despite the logical reasoning of that decision, it is doubtful that many courts will extend the test into this area. Many courts conclude that because a rule has been established for many years, it can only be changed by the legislature. While one basis for stare decisis is reliance, it is not a good argument to state that one committed a tort because he thought the state would be immune. The legitimate feeling by the courts in this area is that any reversal depends upon a consideration of public policy and that the legislature is best equipped to perform this function. Of course, this ignores the fact that the courts established immunity supposedly upon a consideration of the public policy of an earlier time. This should entitle the courts to re-examine these rules in light of the changed policies. However, many courts are going to take the approach of Louisiana[80] by noticing the policy change, but sending the injured claimant to the legislature for relief.

Also, courts have not ignored the powerful lobby groups which fight the overruling of immunity in many areas. Two examples of this are the aftermath of the *Molitor*[81] case and *Gibbon* v. *YWCA*.[82] In the former, the Illinois legislature overruled the case by expressly granting immunity to school districts.[83] This may evidence a short-sighted

[79] *Id.* at 16, 163 N.E.2d at 96: "The doctrine of school immunity was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty, to abolish that immunity. 'We closed our courtroom doors without legislative help, and we can likewise open them'."

[80] *Supra* note 40.

[81] *Supra* note 76.

[82] *Supra* note 55.

[83] Ill. Rev. Stat. c. 122, pars. 821-831 (1959). At the same session, the Illinois Legislature also granted sweeping immunity to park districts, counties, forest preserve districts, and the Chicago Park District.

view held by many legislators on the subject of immunity; fearing the waiver of immunity will result in the breaking of the public coffers, they fail to realize that injuries to citizens must ultimately be paid for by society and that it is better to spread the loss at the time of the injury. But this, an analysis of the reason for overruling such cases perhaps, gives the legislature more credit than is due. The most likely reason for such legislation is simply that the groups which have had their immunity removed by the courts indulge in lobbying activities to have this immunity reinstated. Since the potential victim is not represented, the legislators bend to the pressures of the lobbyists without even looking to the underlying policy considerations.

In the *Gibbon* case, the Ohio Supreme Court refused to extend the *Avellone* doctrine to the YWCA. One of the crutches leaned on by the court was that public policy was evidenced by a bill passed by the legislature[84] (vetoed by the governor), which would have overruled *Avellone*. For a court to rely on a bill which never became law as an expression of public policy, rather than to analyze the problem or to face up to the fact that the judges have changed their minds, is a refusal by the court to shoulder its burden in our scheme of government and is not excusable.

Thus, it may be that fear of legislative overruling, along with a wariness toward any change in the status quo, influences the courts in their decisions in this area to a considerable extent. These factors may also explain why some courts interpret waiver statutes as narrowly as possible, often completely destroying their effect.[85]

CONCLUSION

With many of the original reasons for sovereign immunity no longer of any consequence, and few valid modern reasons to take their place, courts should not be reluctant to re-examine the doctrine before applying it to new situations. While it is true that any change in an established doctrine necessarily limits the predictability of outcome and is not in strict accordance with stare decisis, once a stand on the main policy question has been taken by the court, the outcome in many situations can be easily predicted. By denying immunity to

[84] Sub. Sen. B. No. 241; See discussion of this bill and its probable effect on the court in the *Gibbon* case in 21 Ohio St. L.J. 247, 249 n. 18 (1960).

[85] One example of this is the Michigan court's interpretation of Michigan's waiver of immunity statute, Mich. Stat. Ann. § 27.3548 (8), enacted in 1939 which provided a board of state auditors "to hear and determine all claims and demands . . . against the state and any of its . . . agencies." The court held this to waive only the state's immunity from suit, not its immunity from tort liability, Manion v. State Highway Comm'r, 303 Mich. 1, 5 N.W.2d 527, *cert. denied,* 317 U.S. 677 (1942). For other similar court injected limitations on statutory waivers, see Leflar & Kantrowitz, *supra* note 4.

state-run businesses in competition with private enterprise in areas which are primarily private, the courts can, without statutory authority and without offending the principle of stare decisis, greatly reduce the unjust impact of sovereign immunity at the state level.

The test propounded and urged in this comment is not intended to be the ultimate solution to the problem of state tort liability. It is rather a stop-gap measure which the courts can use to mitigate some of the bitter results obtained under the present law. Such problems as: What to do when government takes over a field which once was primarily private?[86] and, What to do in areas which seem to be private but which no one but government undertakes in our era?[87] have not been discussed and no solution is presented herein. Only the legislature can sweep aside the webs of tradition, stare decisis, colloquialisms, and legal dogmas which plague even the few progressive courts; only the legislature can reach a just solution of the problems of sovereign immunity.

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[86] The construction of roads, which at one time was completely private, has now been almost completely taken over by government.

[87] An example of this is garbage and refuse collection.